

FEDERAL CIRCUIT COURT OF AUSTRALIA

MAHASNEH v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ANOR [2014] FCCA 1038

Catchwords:

MIGRATION – Migration Review Tribunal.

PRACTICE & PROCEDURE – Show cause hearing pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) – no arguable case for the relief claimed – application dismissed.

Legislation:

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), s.422

Migration Regulations 1994 (Cth), reg.1.15A, cl.801.221

Federal Circuit Court Rules 2001 (Cth), rr.44.12, 44.13

Cases Cited:

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437

Minister for Immigration and Ethnic Affairs v Guo & Anor (1997) 191 CLR 559

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155

Selvadurai v Minister for Immigration and Ethnic Affairs (1994) 34 ALD 347

Abebe v Commonwealth of Australia (1999) 197 CLR 510

Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors (1996) 185 CLR 259

Minister for Immigration and Citizenship v SZNPG [2010] FCAFC 51

Applicant: AYAT ALLAH MAHASNEH

First Respondent: MINISTER FOR IMMIGRATION & BORDER PROTECTION

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG 27 of 2014

Judgment of: Judge Emmett

Hearing date: 21 May 2014

Date of Last Submission: 21 May 2014

Delivered at: Sydney

Delivered on: 21 May 2014

REPRESENTATION

The applicant appeared in person

Solicitors for the Respondents: Ms Katherine Hooper
(DLA Piper)

**FEDERAL CIRCUIT
COURT OF AUSTRALIA AT
SYDNEY**

SYG 27 of 2014

AYAT ALLAH MAHASNEH
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

**EX TEMPORE
REASONS FOR JUDGMENT**

1. Pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Pt.8, Div.2 of the *Migration Act 1958* (Cth) (“**the Act**”), the applicant seeks judicial review of a decision of the Migration Review Tribunal dated 13 December 2013 and handed down on the same date (“**the MRT**”).
2. The first respondent seeks an order pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) (“**the Rules**”), that the proceeding before this Court, commenced by way of application on 7 January 2014, be dismissed on the basis that the applicant has not raised an arguable case for the relief claimed.
3. Rule 44.12 of the Rules provides as follows:

“(1) At a hearing of an application for an order to show cause, the Court may:

(a) if it is not satisfied that the application has raised an arguable case for the relief claimed—dismiss the application; or

(b) if it is satisfied that the application has raised an arguable case for the relief claimed—adjourn the proceeding and order a respondent to show cause at a final hearing why an order for the relief claimed should not be made on such of the grounds mentioned in the application as are specified by the Court; or

(c) without making an order under paragraph (b), make final orders in relation to the claims for relief and grounds mentioned in the application.

(2) To avoid doubt, a dismissal under paragraph (1)(a) is interlocutory.”

4. Relevantly, r.44.13 provides:

“(1) At a hearing of an application for an order to show cause, the applicant is confined to the relief sought and the grounds mentioned in the application.”

5. Historically, on 18 December 2008, the applicant applied for a partner residence visa. The sponsor at the time being his wife.

6. On 5 December 2011, a delegate of the first respondent refused to grant the applicant a partner visa, on the basis that the delegate was not satisfied that the applicant and the sponsor were in a genuine spousal relationship. The relevant criteria that the applicant was required to meet in establishing that he was in a spousal relationship, is set out at reg.1.15A of the *Migration Regulations 1994* (Cth) (“**the Regulations**”), as follows:

“1.15A Spouse

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*

(iii) *any basis on which the persons plan and undertake joint social activities; and*

(d) *the nature of the persons' commitment to each other, including:*

(i) *the duration of the relationship; and*

(ii) *the length of time during which the persons have lived together; and*

(iii) *the degree of companionship and emotional support that the persons draw from each other; and*

(iv) *whether the persons see the relationship as a long-term one.*

(4) *If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."*

7. Regulation 1.15A of the Regulations requires that the first respondent consider all circumstances of the relationship, including financial aspects, nature of the household, social aspects, and nature of the person's commitment to each other. In considering whether the applicant and the sponsor were in a genuine relationship, the MRT, in its decision record referred to the large volume of documents received from the applicant and his sponsor, and identified the nature of those documents.
8. The MRT discussed with the applicant the trouble that the applicant said the parties had had in the past about their relationship, including a statutory declaration prepared by the applicant, in which he made claims of domestic violence. Ultimately, the statutory declaration was withdrawn and the applicant explained to the MRT that he did so on the basis that the parties had reconciled.
9. On 30 October 2013, the MRT sent a letter to the applicant inviting the applicant to comment or respond to particular information that caused it concern. The applicant provided a response to that letter, and the

MRT noted his responses in its decision record. The MRT set out the relevant law in relation to its consideration of the matter, as follows:

“[56] Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the ‘sponsoring partner’, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the ‘sponsoring partner’ of the applicant

[57] At the time of the application, ‘spouse’ was defined in Regulation 1.15A and provided that a person is the spouse of another where two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes for the Act; there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others; the relationship must be genuine and continuing; and the parties must live together, or not live separately and apart on a permanent basis. In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence as to the financial and social aspects and the nature of the visa applicant’s and sponsor’s household and their commitment to each other as set out in r.15A(3)...”

10. The MRT accepted that the parties were married to each other under a Marriage Act that was valid for the purposes of the Act. However, the MRT was ultimately not persuaded that they were in a genuine spousal relationship. A fair reading of the MRT’s decision record makes clear that the MRT considered in some detail those aspects identified in reg.1.15A of the Regulations, in considering whether the applicant met the criteria.
11. Ultimately, the MRT was not satisfied that at the time of decision, the parties were in a spousal relationship, and therefore, that the applicant did not meet cl.801.221(2)(c) of Schedule 2 to the Regulations. The MRT found as follows:

“[75]Based on documentary material; and the evidence of the parties, because of the inconsistent evidence of the parties, their lack of knowledge relating to matters they ought to know, and the review applicant’s claims of family violence, supported by competent persons, the Tribunal is not satisfied that, at the time of decision, the parties has a mutual commitment to a shared life as husband and wife to the exclusion fo all others and the relationship is genuine and continuing within the meaning of reg.1.15A.”

The proceeding before this Court

12. On 15 April 2014, the applicant attended a directions hearing before me. On that occasion, I explained to the applicant that the Court has no power to interfere with the decision of the MRT, unless the Court is satisfied that the MRT’s decision is affected by a mistake going to its jurisdiction. I also explained to the applicant that the grounds of his application made a bare assertion that did not disclose an error capable of review by this Court.
13. I informed the applicant that in circumstances where the application does not raise an arguable case for the relief claimed, the application may be dismissed, pursuant to rules of the Court. I also explained to the applicant the consequences that may flow to him from a costs perspective, if he was unsuccessful in his application, and provided him with a copy of both the relevant costs schedule and r.44.12 of the Rules, which was the rule pursuant to which the applicant’s matter was set down for hearing today.
14. The applicant then confirmed that he wished to continue with his application, and, accordingly, was given leave to file and serve an amended application, giving complete particulars of each ground of review relied upon, together with any further evidence and submissions in support. The applicant was also provided with the contact details of legal services providers and interpreting and translation services.
15. On 2 May 2014, the applicant filed an amended application relying on the following grounds:

“1. The MRT had strong evidence that my wife and I are in a spousal relationship and the conclusion that the Tribunal

is not satisfied that we are in a spousal relationship is a denial of natural justice, fairness, and unreasonable.

2. While the MRT had before it that the requirements for a spousal relationship are met such as financial aspect of the relationship, nature of the household, social aspects of the relationship, nature of person's commitment to each other, the MRT ignored that reg.1.15A is met. The MRT had uncontested evidence that the requirements for the regulation had been met yet betrayed the applicability of the regulation. The MRT based and placed weight on some minor inconsistencies and ignored entirely that the regulation 1.15A was met.

3. the MRT had before it concrete evidence of miscarriage, evidence of temporary residence approval 820 yet the MRT having regard to factors set out in sub regulation 1.15A of the regulation erred in law in a conclusion that we are not in a marital relationship. The conclusion of the MRT is contrary to the law and would lead the Honourable Court to accept that the MRT failed to conduct its duty to have regard to apply the regulation.

4. In the circumstances, the MRT failed to act as it was required to do by sub regulation 1.15A and failed to grant the visa.

5. I ask the honourable Court to look at the MRT decision, the Transcript and the support by both my wife and I and remit the case to be considered according to law.

6. Our relationship which started on 7 June 2008 and continues until now will help the honourable Court to consider that we have been in a spousal relationship for many years until now and that the claim under domestic violence was never assessed by the Department of Immigration nor by the MRT but should not be a point to diminish the genuine and continuing relationship. The MRT decision that was made on 13 December 2013 was unfair, unjust and unreasonable. ”

16. The applicant also filed an affidavit, affirmed by him 2 May 2014, annexing a transcript of the MRT hearing.

17. The solicitor for the first respondent tendered a bundle of relevant documents identified as Court Book, filed on 1 May 2014, which was marked 'Exhibit 1R.'
18. The applicant was unrepresented before the court this morning, but confirmed that he relied on the grounds of his amended application.
19. In relation to ground 1, the applicant asserted that the MRT denied him natural justice, and its decision was neither fair nor reasonable. No particulars were provided in support of that allegation, and the applicant did not take the Court to any parts of the transcript in support of the grounds of his amended application today.
20. I asked the applicant in what way the MRT had denied him natural justice or was unfair or unreasonable in the conduct of its review including its decision. It was plain from the applicant's oral submissions that his substantive complaints are that the MRT had erroneously found that he was not in a genuine spousal relationship with his wife; that the MRT had erred because it had not accepted his evidence; and that the MRT had placed undue weight on minor inconsistencies while ignoring the requirements of reg.1.15A of the Regulations in considering whether the applicant's relationship was genuine.
21. In relation to the applicant's complaints about natural justice, and the findings and conclusions of the MRT, I note that Division 7, Part 4 of the Act sets out the procedural code with which the MRT must comply. Moreover s.422B of the Act states to be an exhaustive statement of the natural justice rule. Those obligations include a requirement that the MRT invite the applicant to come to a hearing, to give evidence, and provide arguments in support of his application.
22. On 27 August 2013, in accordance with Division 7 Part 4 of the Act, the MRT wrote to the applicant, informing him that the MRT had considered the material before it, but was unable to make a favourable decision on that information alone. The letter invited the applicant to appear before the MRT at a specified date, time, and location. The applicant appeared at the MRT hearing. As stated above, the MRT's decision record makes clear that it explored with the applicant his

claims, and put to the applicant concerns that it had about his claims, and noted the applicant's responses.

23. It is well established that the MRT is not required to accept uncritically any and all claims made by an applicant (*Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451 per Beaumont J; *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559 at 596 Kirby J; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-70 per Wilcox J). Nor does the MRT have to possess rebutting evidence before holding that a particular assertion was not made out (*Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347 at 348 per Heerey J).
24. The MRT's obligation was to consider the matters identified in reg.1.15A of the Regulations as they applied to the MRT's assessment of the evidence and material before it.
25. It is clear from the MRT's decision record that it did consider each of the matters identified in reg.1.15A of the Regulations, in considering whether or not it was satisfied at the time of decision whether the parties were in a spousal relationship. The MRT was entitled to have regard to inconsistencies that it found to exist in the evidence provided by the applicant to it, and to weigh those inconsistencies in reaching its findings and conclusions.
26. The applicant's amended application also asserts that the MRT did not assess the applicant's claim of domestic violence. I understood the applicant's complaint to mean that the MRT should not have had regard to that matter in a manner adverse to the applicant in considering whether the applicant and the sponsor were in a genuine relationship. The MRT's decision record makes clear that the MRT discussed with the applicant his statutory declaration alleging domestic violence, and the reasons why the applicant did not pursue those domestic violence claims.
27. Ultimately, the MRT made the following findings arising from that evidence, in its decision record as follows:

"[71] The MRT finds that the review applicant informed the Department that he was the victim of family violence. He

submitted a detailed declaration in which he stated that he feared for his safety, the relationship had broken down, and the sponsor was in a new relationship. The parties gave evidence that they did not live together for a number of months in 2011. The MRT places substantial weight on the review applicant's statutory declaration relating to family violence. The MRT also places significant weight on the statutory declarations from the psychologist and the social worker, in which they stated that the review applicant was the victim of family violence.

[72] The MRT has also taken into account the evidence of the parties that they have since reconciled, their relationship was interfered with by third parties, their future plans and their commitment to one another. Having regard to its abovementioned findings, the MRT places some weight on the nature of the parties' commitment to one another."

28. It was for the MRT to weigh all the evidence before it, and to reach conclusions on the jurisdictional issues before it. The fact that the applicant does not agree with those findings and conclusions does not, by itself, establish jurisdictional error.
29. Whilst I make no final determination in respect of the matter, there is no jurisdictional error on the face of the MRT's decision record, or the conduct of its review. The applicant's complaints are more in the nature of a disagreement with the findings and conclusions of the MRT. As such, those complaints invite merits review, which this court cannot undertake. (*Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at 53-54; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ). The following was stated in *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51 at [20] by North, Lander and Katzmann JJ:

"It was not for the Federal Magistrate's Court, nor for this Court, to review the merits of the RRT's decision: Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272; Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611. A wrong finding of fact is not an error of law: Waterford v The Commonwealth (1987) 163 CLR 54 at 77. Unsound reasoning is not an error of law: Reg v The District Court; Ex parte White (1966) 116 CLR 644 at

654; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 356.”

30. In all the circumstances, I am not satisfied that the applicant’s application has raised an arguable case for the relief claimed, and accordingly, the proceeding before this Court, commenced by way of application filed on 7 January 2014, should be dismissed with costs.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 30 May 2014